APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK COSTELLO,

Appellant.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From a judgment convicting the defendant of several contempts of the United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, the defendant appeals. Affirmed in part and reversed in part.

SPENCE, HOTCHKISS, PARKER & DURYEE, *Attorneys for Frank Costello, Defendant-Appellant;* Kenneth M. Spence, Ernest Angell, Julius J. Teller, and Huyler C. Held, Counsel.

MYLES J. LANE, United States Attorney, *for United States of America, Plaintiff-Appellee;* Joseph P. Martin, Chief, Criminal Division, Robert Martin and Stanley D. Robinson, Assistant United States Attorneys, Counsel.

Appendix—Opinion of Court of Appeals

AUGUSTUS N. HAND, *Circuit Judge*:

The Defendant, Frank Costello, was convicted of ten* separate contempts of the United States Senate Crime Investigation Committee, 2 U. S. C. A. §192, and was sentenced to a term of eighteen months imprisonment and to pay a fine of $5,000.

Counts 1, 3 and 4 of the indictment charged the defendant with refusal to answer the following questions: (1) "What is your net worth?", (3) "Do you owe any sums of money in excess of $10,000 to any person?", and (4) "What is the total indebtedness, Mr. Costello?" As to each of these questions, the defendant rested his refusal to answer on the ground that his answers might tend to incriminate him. At the trial the defendant conceded that the Committee was lawfully created and organized; that he was properly subpoenaed; and that the stenographer's minutes of the hearings were accurate. No question was raised as to the relevancy of the questions to the scope of the Committee's inquiry. The only issue presented was whether a privilege against self-incrimination was properly asserted. The court below ruled, as a matter of law, that it was not because the defendant had no "reasonable belief * * * that disclosure or answer would furnish evidence which would tend to incriminate him."

In the recent case of *Hoffman* v. *United States*, 341 U. S. 479, the Supreme Court said that the claim of privilege should be sustained unless it is " * * * '*perfectly clear* from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer (s) *cannot possibly* have such a tendency' to incriminate" (341 U. S. at 488). We think it is fairly obvious that under this test, the privilege was validily asserted by the defendant

* The indictment contained an additional charge which was dismissed by the court.

and that the convictions under Counts 1, 3 and 4 must be reversed. The statements of the Committee's counsel as to the subjects concerning which he intended to examine Costello and the Committee's interim report, issued after Costello had testified in active session as to his financial resources, which described Costello as one of the leaders of a major crime syndicate, let alone the obvious income tax implications of the questions asked, could have sufficed to create a reasonable apprehension in the mind of the defendant that his answers might be incriminating. The fact that the defendant had previously stated to the Committee that he "always upheld the Constitution and the laws" did not remove the possibility that answers to specific questions might incriminate and we think that a contrary inference was not permissible. See *People ex rel. Taylor* v. *Forbes,* 143 N. Y. 219, 230, where the New York Court of Appeals, in an opinion by O'Brien, *J.*, said: "The witness * * * (by affirmations of innocence) did not waive his right to remain silent when it was sought to draw from him some fact or circumstance which in his judgment might form another link in the chain of facts and capable of being used under any circumstances to his detriment or peril." Nor did the defendant "Waive" that right when he gave testimony as to his assets or when he agreed to furnish the Committee with a complete financial statement. The position of the defendant in that respect was not unlike that of the bankrupt in *Arndstein* v. *McCarthy,* 254 U. S. 71, and *McCarthy* v. *Arndstein,* 262 U. S. 355. There the bankrupt Arndstein had filed schedules purporting to show his assets and liabilities and had answered certain questions relating thereto but refused to answer over 400 other questions on the ground that his answers might be incriminating. He was committed to jail for contempt, and upon an appeal from the denial of a writ of habeas corpus, the Supreme Court in the first *Arndstein* case held that since the schedules standing alone

did not amount to an admission of guilt or furnish clear proof of crime, " • • • the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him" (254 U. S. at 72). The second *Arndstein* case dealt with the question whether the bankrupt had lost his privilege by having answered without objection similar questions relating to his finances. The court's holding was the same, in other words, that so long as the testimony voluntarily given did not amount to an admission or proof of guilt, the bankrupt " • • • was entitled to decline to answer further questions when so to do might tend to incriminate him" (262 U. S. at 360). It is not contended here, nor is it a fact, that Costello's previous answers constituted an admission or proof of any crime; consequently, he did not by giving them destroy his privilege as to the questions he refused to answer.

The remaining counts of the indictment—5 through 11—relate to the defendant's conduct at hearings held on March 15 and 16, 1951. Counts 5 and 6 of the indictment charged the defendant with wilful default in terminating his appearance before the Committee without leave and in refusing on March 15, 1951, to give any testimony whatever pertinent to the question under inquiry. Count 7 was based on his failure on the same day to answer the question whether he was familiar with the testimony of McLaughlin. When he appeared before the Committee on the morning of March 15, his attorney stated that the defendant was too ill to testify and requested an adjournment of the examination. After colloquy between the Committee and his attorney, Costello refused to give any furthere testimony, saying: "You heard my statement through Mr. Wolf, and I stand by it, and under no condition will I testify from here in, until I am well enough". The chairman, Senator Kefauver, thereupon instructed Mr. Halley, the Committee's counsel, to proceed with the questioning

of the witness and he was asked a question which he refused to answer, but instead reiterated his intention of leaving the hearing-room. At that point, Mr. Halley instructed him as to the seriousness of that act and told him to obtain an affidavit from a physician if he was too ill to give testimony. Costello's attorney thereupon produced a physician's certificate which stated that the defendant was suffering from acute laryngotracheitis and that he should remain in bed. The Committee rejected this certificate and after further colloquy, Costello was directed to answer the question* but he refused and left the room.

Count 8 of the indictment charged that the defendant had wilfully defaulted in refusing to give any testimony whatever at the hearing on March 16. Counts 9, 10 and 11 dealt with his refusal to answer specific questions on that date. On March 16 the physician, whose certificate had been presented to the Committee the day before, appeared before the Committee and testified that in his opinion Costello was capable of testifying for an hour or so a day. The defendant was then called before the Committee and informed of this testimony, but he presented another certificate, this time from his regular physician, stating that in the latter's opinion sustained conversation by the defendant would be dangerous to his health. The defendant requested an adjournment but the Committee refused and proceeded to question him, at which time the following colloquy took place:

> "The Chairman: Well, let's try a few questions and see how we get along.
>
> Go ahead, Mr. Halley.
>
> Mr. Halley: Mr. Costello, did you have a meeting with William O'Dwyer in the year 1942?

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* The exact wording of the question he was directed to answer was: "Mr. Costello, would you state whether or not you are familiar with testimony given yesterday by Mr. Francis McLaughlin?"

Mr. Costello: I refuse to go further with the questioning—answering the questions—until I feel fully well and capable.

The Chairman: Mr. Costello, it wouldn't strain your voice if you just put the mike up a little closer so we could hear.

Mr. Halley: Mr. Costello, do you know Mr. James Moran?

The Chairman: Let's cut the cameras off. Let's not have any noise.

Mr. Costello: I refuse to answer the question.

Mr. Halley: Do you know Mr. James Moran?

The Chairman: Just a minute. You are directed to answer for a short while. I think you can answer a few questions this afternoon.

Mr. Costello: I don't care to answer any questions.

The Chairman: It is not a matter whether you care to answer them, Mr. Costello.

Mr. Costello: I don't feel I am fit to answer any questions today and answer them truthfully and sensibly.

The Chairman: What was the last question?

Mr. Halley: Do you know Mr. James Moran?

Mr. Costello: I couldn't answer the question today.

Mr. Halley: Do you know Mr. Frank Bals?

Mr. Costello: I am not going to answer the question today.

The Chairman: Well, you understand you are being directed to answer these questions?

Mr. Costello: And I am answering them, tell you—

The Chairman: There is no use continuing if he is not going to answer them."

After further discussion it was agreed that the Committee would appoint a physician to examine the defendant and he was excused from the hearing.

We are of the opinion that the convictions on Counts 7, 9, 10 and 11 must be reversed. Each of those counts dealt with the defendant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions, each time eleciting the same answer: his refusal to give any testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions cannot be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable. Cf. *Maxwell* v. *Rives*, 11 Nev. 213; *Fawick Airflex Co., Inc.* v. *United Electrical, Radio & Machine Workers of America*, 92 N. E. 2d 431 (Ohio App.); *People ex rel. Amarante* v. *McDonnell*, 100 N. Y. S. 2d 463.

It is urged by the defendant that Counts 5, 6 and 8 are also defective for the reason that the resolution of the Senate citing him for contempt, required by 2 U. S. C. A. §194,* was based only on the refusal to answer certain questions and that the indictment must therefore be lim-

* §194. *Witnesses failing to testify.* Whenever a witness summoned as mentioned in section 192 of this title fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for action.

ited to the acts of contempt contained in the resolution, the text of which is quoted in the margin.* It is argued that since there was no charge of wilfulness in the resolution, there could be no indictment based on wilful default. We do not believe that section 194 is to be so construed or restricted. It merely requires a certification of the facts to the appropriate United States Attorney who is charged with bringing the matter before the grand jury. A certification under this section means only that the Senate has elected to have the contempt punished as a misdemeanor; this method is but an alternative one for vindicating the authority of Congress. *Jurney* v. *MacCracken*, 294 U. S. 125. Moreover, the Committee's Report, which set out in full what transpired at the hearings on the instances of the claimed defaults, was attached to the resolution as certified by the Senate. So, under any interpretation of the statute, the resolution was broad enough to support the indictment.

The defendant also attacks Counts 5, 6 and 8 on the ground this his conduct did not obstruct the Committee's inquiry because he later returned and answered all the questions asked of him by the Committee. In support of this contention he argues that his refusal to testify on the 15th and 16th of March was not wilful, but that, in fact, he intended to return when he felt that he was in condition to testify. We think the charge of the trial court and the

* Resolved, That the President of the Senate certify the report of the Special Committee to Investigate Organized Crime in Interstate Commerce of the United States Senate as to the refusal of Frank Costello to answer certain questions in response to subpena duly issued, before the said special committee, together with all the facts in connection therewith, under the seal of the United States Senate, to the end that the said Frank Costello may be proceeded against in the manner and form provided by law. Congressional Record, March 30, 1951, p. 3133.

jury's verdict are a complete answer to this contention. The court charged the jury as follows:

> "• • • when the defendant appeared before the Committee he was required by law to give testimony on all matters pertinent to the inquiry being conducted by the Committee. The law is that a witness does not have the legal right to dictate the conditions under which he will or will not testify, or the conditions under which having appeared he will remain in attendance.
>
> This does not mean, however, that a witness must either remain in attendance or testify when he is physically or mentally unable to do so or where there is reasonable basis for belief by him that by so doing his health would be seriously impaired. That is a question which is within your province to decide and on which the Government has the burden of proof.
>
> You are charged that when the defendant appeared before the Committee he was required by law to remain in attendance and not to depart from the presence of the Committee without leave of the Committee so long as he was physically able to so remain and so long as he was able to do so without reasonable basis for belief by him that his health would be seriously impaired.
>
> • • • • •
>
> To find that the defendant acted wilfully you must find that he did not act in good faith when he left the presence of the Committee, or when he refused to give any testimony. A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney

> that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith."

The court's charge was a correct statement of the law and the jury's verdict is conclusive on the question whether the default was wilfully committed.

Finally, objection is made to the exclusion of certain evidence and to the charge of the court. Evidence that the defendant attended Committee Hearings on March 19, 20 and 21 and was then willing to answer the questions asked of him was offered to show that his previous defaults did not obstruct the investigation. As we have indicated above in our approval of the court's charge to the jury, such evidence was irrelevant and was properly excluded and no mention thereof in the charge was required. The exclusion of the transcript of the testimony before the Committee of Dr. Panettiere was proper as it was clearly hearsay and there was no showing that the doctor was unable to testify at the trial.

The judgment of convictions on Counts 5, 6 and 8 is affirmed and reversed as to Counts 1, 3, 4, 7, 9, 10 and 11.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 329

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 421-429) is reported at 198 F. 2nd 200.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1952 (R. 430), and a petition for rehearing was denied on August 1, 1952 (R. 430-431). On August 22, 1952, Mr. Justice Jackson extended the time for filing a petition for a writ of

certiorari to and including September 15, 1952 (R. 433). The petition was filed on September 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2), and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence presented, comments of the prosecutor, and instructions by the trial court, relative to three counts of the indictment as to which petitioner's claim of the privilege against self-incrimination was overruled by the trial court, but sustained by the Court of Appeals, so prejudiced the jury against the petitioner that his conviction for contempt on three other counts, for leaving a Senate Committee without consent, and for refusing to give any testimony at all, cannot be sustained.

2. Whether the fact that a witness subsequently answered questions after he improperly refused to give any testimony before a Congressional committee, prevents his prosecution for contempt on the ground that he has not "obstructed" the Committee.

3. Whether petitioner was deprived of a fair trial by the exclusion of evidence which he alleges tended to show that he was acting in good faith when he refused to testify before the Committee and walked out of the Committee hearing, although he did not offer the evidence to show good faith.

4. Whether the offenses chargeable in an indictment under 2 U.S.C. 192 and 194 are limited by

what is specifically detailed in the Senate resolution certifying the contempt.

5. Whether the offenses of which petitioner has been convicted are separate offenses.

STATUTE INVOLVED

2 U.S.C. 192 and 194, R.S. 102 and 104, as amended by the Act of June 22, 1938, 52 Stat. 942, provide as follows:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.
>
> * * * * *
>
> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or con-

> current resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

STATEMENT

The petition for a writ of ceritorari seeks review of a judgment sustaining petitioner's conviction on three counts of an indictment charging him with contempt of the special Senate Committee to Investigate Organized Crime in Interstate Commerce (R. 430). The counts on which his conviction was affirmed charged in count 5 (R. 4) that on March 15, 1951, he

> * * * did wilfully make default, in that [he] did terminate his attendance before the aforesaid Committee and depart from the presence of the aforesaid Committee without leave of the aforesaid Committee

in count 6 (R. 4) that on the same day

> * * * then and there * * * did refuse to give any testimony whatever pertinent to the question under inquiry by the aforesaid Committee

and in count 8 (R. 5) that on March 16, 1951, he

> * * * did wilfully make default in that [he] did refuse to give any testimony whatever pertinent to the question under inquiry by the aforesaid Committee.

All of the conduct involved in these three counts was justified by petitioner before the Committee on the basis that his physical and mental condition made it impossible for him to testify properly (R. 326, 328-329, 338-345). In addition, petitioner also indicated on March 15, 1951, that continued testifying would endanger the condition of his throat (R. 334-336).

In partial support of his March 15, claim, petitioner submitted the following certificate from Dr. Vincent J. Panettiere (R. 334-335):

> Mr. Frank Costello of 115 Central Park W. is confined at home in bed. He is suffering from acute laryngotracheitis. He should remain in bed and have complete voice rest for several days. Respectfully submitted. Vincent Panettiere.

The Committee rejected the claim that this statement showed that petitioner was unable to testify without danger to his health, and rejected also pe-

titioner's own claim to this effect. It proceeded to ask him the question set out in count 7 (R. 336). Petitioner refused to answer, and, in violation of the Committee's order to answer that question and "such other questions as will be asked this afternoon" (R. 336), left the Committee hearing room (R. 337).

The following day, March 16, 1951, the Committee heard testimony from Dr. Panettiere (Def. Ex. F, R. 350-353), on the basis of which it concluded that petitioner could testify for a while. It advised petitioner as follows (R. 339):

> Mr. Costello, your physician was in this morning, and testified, as you may know, that you had no temperature; and in his opinion there wasn't any reason why you should not, at least, testify an hour a day; it couldn't do you any harm if you spoke in a moderate voice.
>
> So that, under the continuing subpoena that you are under, we asked you to come back today. We would like to ask you some questions, and, after a reasonable time, in line with what your physician said, if you got tired, or if your throat bothers you too much, if you will let us know, we will carry it over until the next time we meet.

Petitioner offered in evidence the certificate of another physician, Dr. Douglas Quick, who had been treating petitioner, but who was not available

at the time the Panettiere certificate was obtained (R. 339-341). This certificate stated (R. 340-341):

> Mr. Frank Costello has had a heavy cold and a laryngitis for nearly two weeks. During this week the laryngitis has gotten steadily worse until he is now unable to talk in sustained conversation, and any effort in this direction will cause further and continuing danger to his larynx. * * * but he has been having local and general treatment for ten days—this includes penicillin and aureomycin.
>
> Mr. Costello has had a severe throat affliction, for which I have treated him over a period of nearly 18 years .

The Committee concluded that "the certificate does not say that Mr. Costello is not able to testify or that testifying for a short time would injure his health or his throat * * *," and authorized the Committee counsel to proceed (R. 342-343). Petitioner continued to refuse to testify, specifically refusing to answer the questions set out in counts 9, 10, and 11 of the indictment (R. 343-344). At the conclusion of this hearing it was arranged that petitioner would be examined by a physician selected by the Committee (R. 344-345). Petitioner was in fact examined by this physician, Dr. John D. Kernan, the following morning (R. 107-108).

On March 19, 1951, two days later, petitioner again appeared before the Committee and answered the four questions asked him on March 15 and 16 (R. 346-348).

On March 17, 1951, the Committee considered "the testimony and deportment" of petitioner and recommended that he be cited for contempt of the Senate (R. 358). This recommendation, together with a later recommendation arising out of testimony given on March 19, 20, and 21, was approved by the full Senate and made part of a Senate Resolution (No. 110), which was passed by the Senate and thereupon certified to the United States Attorney for the Southern District of New York "to the end that the [petitioner] may be proceeded against in the manner and form provided by law" (R. 354). Attached to the resolution sent to the United States Attorney was a full transcript of the legislative proceedings (R. 354).

At the trial, the Government showed both by the testimony of the Committee counsel, Rudolph Halley, and by the legislative record, that the events set out above had occurred. In addition, the Government, to show that petitioner could have testified without danger to himself, introduced the testimony of Dr. Douglas Quick, petitioner's own physician, Miss Grace Myers, Dr. Quick's nurse, and Dr. John D. Kernan, who examined petitioner at the request of the Government on March 17, 1951.

Dr. Quick testified (R. 84) that on the basis of his examination of petitioner on March 16, that:

> * * * I talked to [petitioner] about saving his voice as much as possible; told him particularly not to put unnecessary stress on the voice, not force it to try to be heard in the presence of any confusion or anything of that sort. I

> told him to make answers that he might be required to make as short as possible, and that I perhaps repeated three or four times in the course of the actual treating of him. I told him that he ought not to take more than an hour or two if he could possibly avoid it.

Dr. Kernan testified, *inter alia,* that when he examined petitioner on March 17, his vocal chords were normal in appearance; and they would not have been so on March 17 if they had been inflamed on March 15 or March 16 (R. 108-111).

At the close of the Government's case, the petitioner moved for an acquittal (R. 187). As he declined to put on any case, the motion was directed to the whole case (R. 218). The motion was denied (R. 220). Petitioner declined to submit any instructions for submission to the jury (R. 220). And he declined to participate in summation to the jury (R. 220).

Petitioner was convicted on ten counts (R. 311). Counts 1, 3 and 4 were based upon his refusal to answer questions as to which he claimed the privilege against self-incrimination (R. 2-3, 25-26, 165-167). The Court of Appeals, holding that such claim should have been sustained, reversed the conviction on those counts. It also reversed petitioner's conviction on counts 7 and 9-11, each of which was based on petitioner's refusal to answer a specific question after he had refused to answer any questions at all (R. 426-427). The conviction

was sustained on counts 5, 6 and 8 described above (*supra*, pp. 4-5).

ARGUMENT

1. Petitioner's first contention is that the jury could not impartially have considered the evidence on the counts of the indictment on which his conviction was affirmed because of the evidence adduced, the arguments of the prosecution, and the language of the court's instructions, with respect to three of the counts of the indictment on which the jury returned verdicts of guilty, but as to which the Court of Appeals reversed. These counts related to questions which Costello refused to answer on the ground of possible self-incrimination. One of these questions, asked on March 13, 1951, was, "What is your net worth?" (Count 1.) The other two, asked on March 21, 1951, were, "Do you owe any sums of money in excess of $10,000 to any person?" (Count 3), and, "What is the total indebtedness, Mr. Costello?" (Count 4.)

Petitioner refers to remarks by the prosecutor in his opening and closing statements alluding to petitioner's "illegitimate business" and "criminal friends and associates" (Pet. 16). In addition, petitioner alleges that the instruction rejecting his claim of privilege as a matter of law, coupled with further instructions which told the jury to give consideration, in connection with the issue of petitioner's good faith (relevant only in connection with counts 5 through 11), "to the reasons given by

[him] for his acts, as well as the entire testimony of the defendant before the Committee, and the entire proceedings of the Committee which were had before the defendant", permitted the jury to infer that the rejected claim of privilege was relevant on the issue of good faith (Pet. 14-15).

There are at least three answers to petitioner's contentions in this regard.

(a) The trial court's instructions, when read as a whole, made very clear what the jury were required to find before they could convict petitioner on the various counts, and carefully separated the issues arising under counts 1, 3 and 4 from those arising under counts 5, 6 and 8 (R. 288-293). Thus, the court stated, by way of preface:

> You are to determine the guilt or innocence of the defendant as to each count separately and apart from all the others [R. 288].

And coming to the specific counts, it stated:

> You will first come to consider the guilt or innocence of the defendant on Counts 1, 3 and 4 [R. 289].

Then, after advising the jury that Costello's claim of privilege with respect to the questions set forth in counts 1, 3 and 4 was not valid and that the issues under those counts were whether the questions were asked, whether petitioner heard and understood them, and whether he failed to answer although he was physically and mentally able to do

so (as was conceded (R. 289-290), the court stated:

> You will next come to consideration of Counts 5, 6 and 8 [R. 291].

With respect to those counts, the court stated (R. 292), *inter alia:*

> You are charged that when the defendant appeared before the Committee he was required by law to remain in attendance and not to depart * * * without leave of the Committee so long as he was physically able to remain and so long as he was able to do so without reasonable basis for belief by him that his health would be seriously impaired.

It is true that the court later stated, as petitioner points out, that the jury, in determining petitioner's wilfulness should consider his "entire testimony * * * before the Committee" as well as the "entire proceedings of the Committee which were had before the defendant" (R. 292-293). But these remarks were expressly addressed to counts 5, 6 and 8. And they certainly did not permit the jury to infer that petitioner's claim of privilege with respect to the questions set forth in counts 1, 3 and 4, though wrong, could be considered on the issue of wilfulness involved in counts 5, 6 and 8.

The limited meaning of the court's language upon which petitioner relies was emphasized by what the court said in a supplemental instruction. After beginning its deliberations, the jury had inquired of the court whether Costello had "the right

to refuse to answer due to possible self-incrimination" (R. 305). To this, the court answered, *inter alia*, that (R. 306):

> * * * I have ruled as a matter of law—and you are bound to accept my ruling on that matter—that the defendant's claim of his constitutional privilege against being required to give evidence against himself or giving evidence which might tend to incriminate him with respect to these three questions, was not legally and lawfully asserted. That is, there was no basis in law, and I overruled his claim. You are required to accept that ruling of the Court.
>
> Now, I do, however, want to point this out to you, that the fact that the defendant did assert a constitutional privilege is in no way to be considered as evidence against him. We are concerned with the guilt of this defendant or his innocence only on the ten counts of the indictment, and you are not to consider the fact that he did claim immunity or claimed his constitutional privilege as a justification for refusing to answer the questions embraced in Counts 1, 3 and 4 in any way against him. I have overruled that claim. That ends the matter, and dismiss it entirely from your minds from thence on. Do not consider it with reference to any of the counts in the indictment as against the defendant.

This instruction, which clearly answers petitioner's objection, was made at a time when the jury were most likely to remember it.

(b) The basic difference between the issues raised under counts 1, 3 and 4 and those raised under counts 5, 6 and 8, makes it very unlikely that the jury would be confused. Since there was no doubt that the questions set out in counts 1, 3 and 4 had been asked petitioner, that the court had held them to be proper questions, and that petitioner had refused to answer them, the issue on those counts was very clear; and we may concede *arguendo* that the court's statement of the law was, as petitioner observes, tantamount to a directed verdict. But the observation proves too much. For it is precisely the simple and directive character of the instructions with respect to counts 1, 3 and 4 which makes it extremely unlikely that the jury did not deal with the issues under counts 5, 6 and 8 separately and in accordance with the court's instructions.

(c) Petitioner's present complaint is one which may arise whenever any two charges are tried together. There is often a possibility of prejudice to a defendant's chances of acquittal on a particular charge when he is tried at the same time on another related charge. If petitioner's position is sound, this may never be done, or at least, whenever a conviction on one charge is reversed for some error at the trial, the conviction on the other must likewise be reversed. There is no support for such a proposition. Compare *Miranda* v. *United States,* 196 F. 2d 408 (C.A. 9), petition for certiorari pending, No. 40 Misc., O.T. 1952; *Marzani* v. *United States,* 168 F. 2d 133, 138 (C.A.

D.C.), affirmed by an equally divided court, 335 U.S. 895.

Moreover, if such a possibility of prejudice as is here claimed exists, it would seem to be apparent even before trial. Here, for example, the defense must have planned before the trial to challenge the right of the Committee to insist on answers to the questions set out in counts 1, 3 and 4. Consequently, it seems to us that the objection, which is essentially one of improper joinder of offenses, was waived by Costello's failure to make it before trial (see Rule 12(b)(2), F. R. Crim. P.), or at least by his failure either to make his present objection at the conclusion of the instructions, or to request more specific instructions as to the separateness of the charges involved in the two sets of counts and the evidence which the jury could consider with respect to each set (Rule 30, F. R. Crim. P.).

2. Petitioner also contends that it was error to hold that he had obstructed the inquiry of the Committee within the meaning of 2 U.S.C. 192 because he appeared before the Committee several days after March 15 and 16 and answered all of the questions that he had earlier refused to answer, except those as to which the Court of Appeals held that he had properly exercised his privilege against self-incrimination.

The argument is plainly insubstantial. All other objections aside, it is obvious that to delay, on March 15 and 16, 1951, the work of a committee whose life is to expire on March 31, 1951 (R. 327),

is to obstruct it. If factual support for this is needed, there was explicit testimony by counsel for the Committee that the refusals of March 15 and 16 did in fact impede the Committee's hearings and interfered with "the timing and the sequence of questions and the sequence of calling witnesses" (R. 139).[1]

As in the case of criminal contempts, punishment under Section 192 is not designed to coerce answers. It is to vindicate the authority of the tribunal. Consequently, the fact that the witness finally answers is not important. Compare *United States* v. *Bryan*, 339 U.S. 323, 327, with *Gompers* v. *Bucks, Stove & Range Co.*, 221 U.S. 418, 451-452. See also *Duell* v. *Duell*, 178 F. 2d 683, 685 (C.A. D.C.); *Wilson* v *United States*, 65 F. 2d 621, 623 (C.A. 3); *Walling* v. *Crane*, 158 F. 2d 80, 83 (C.A. 5).

3. Petitioner challenges the exclusion of evidence, which he now claims was pertinent to the issue of good faith, relating to (1) his subsequent attendance at later committee hearings and answering of all proper questions and (2) the actual testimony before the committee of Dr. Panettiere, one of his physicians, with regard to his physical condition.

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[1] The counsel also testified to the further obstructive effect which was just as real, even if less easily measurable:

"It further interfered with the Committee's work in that the Committee had a number of witnesses under subpoena, and that if Mr. Costello were permitted to answer questions when and where he chose and the other witnesses followed suit, the Committee would be completely unable to function" (R. 139).

(a) A preliminary and sufficient answer to petitioner's present position on this score is his own position in the trial court. There his counsel at all times contended that there were no issues of fact to be submitted to the jury, and that all issues in the case were issues of law. Counsel stated this prior to the trial (Tr., March 27, 1951, pp. 9-10, 31-32; March 28, 1951, pp. 46, 50) in his opening to the jury (R. 20) and on numerous occasions throughout the trial (R. 49, 62-63, 104, 187, 215, 216, 220). An example is the following colloquy which occurred between Costello's counsel and the trial court (R. 187):

> Mr. Spence: I do not claim that any factual issue should go to the jury.
>
> The Court: Well, apparently you have urged some. Assuming that I rule against you on the law, what factual issues do you want submitted to the jury?
>
> Mr. Spence: I see no factual issues for the jury, sir.

Specifically, petitioner's counsel stated that petitioner's illness was not a factual issue for the jury (R. 152), and that the Government's proof as to petitioner's condition was not contradicted by petitioner (R. 216); that "it is a straight question of law as to whether or not he terminated his appearance before the Committee" (R. 63); and that "the question of whether or not this was or was not a wilful default under the circumstances is a question for the Court" (R. 215). After being

informed by the court that it intended to submit the questions of petitioner's illness and honest belief as to his illness to the jury, counsel stated (R. 220):

> The defendant takes the position that he is unwilling to participate in the summation of this issue to the jury, and I state now that I do not desire to sum up or make any argument to the jury.

Counsel declined to submit any requests to charge (R. 220), though he had previously been apprised that in the absence of requests, the court would follow the charge it had given in the prior trial of this case (R. 183). Counsel thereafter formally waived summation (R. 223, 269).

In view of this record, there could be no basis, in the absence of egregious error, for petitioner now to question the manner in which the evidence was admitted and submitted to the jury. In an analogous situation, it was observed:

> Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interests, they cannot be permitted at a later time, after a decision has been rendered adverse to them to obtain a retrial according to procedure which they have voluntarily discarded and waived * * *.

Carruthers v. *Reed,* 102 F. 2d 933 (C.A. 8), and see *United States* v. *Rosenberg,* 195 F. 2d 583, 596, fn. 9 (C.A. 2), certiorari pending, Nos. 111, 112, O.T. 1952.

(b) But even assuming, for the purposes of argument, that petitioner is not foreclosed by his assertions of the nature of the issues in the trial court, he is foreclosed from contending that it was error to exclude these items of evidence for a purpose for which he never offered them.

Although his present suggestion is that the evidence of his subsequent appearance and answering was relevant to show that his refusals to answer on March 15 and 16, 1951, were in good faith, the evidence was never offered for this purpose. As a matter of fact, the record shows that petitioner did not offer before the jury any portions of the transcripts of the committee's proceedings on March 19, 20 and 21. The only thing he did in this regard was to ask one question of Mr. Halley, on cross-examination, concerning a comment that Senator O'Conor had made on March 19, that the committee would like to have the previously unanswered questions repeated, Senator O'Conor specifically quoting the question set forth in count 7 of the indictment (R. 129). Upon inquiry by the trial court, petitioner's counsel stated that the purpose of the interrogation was to show that petitioner, at the committee's request, had subsequently answered the question set forth in count 7, and thus that there had been no obstruction of the committee's investigation in this regard (R. 129-130). The trial court ruled as a matter of law that subsequent answering of the question did not purge the prior refusal, that the committee had not held that petitioner had purged himself, and that,

as a matter of law, there was a sufficient showing of obstruction (R. 130). The court made no ruling as to the admissibility of the evidence in question, but simply rejected these defenses as a matter of law. Petitioner did not thereafter seek to introduce any evidence in respect of his subsequent answering,[2] either on cross-examination or on his direct case, although the court had never ruled it out, and although he had subsequent opportunity to do so (R. 139-140, 180-181).

The stenographic transcript of the testimony given by Dr. Vincent J. Panettiere before the committee on March 16, 1951, was properly excluded. It was either hearsay or irrelevant. On March 15, 1951, the first day that petitioner refused to testify, he gave the committee a certificate from Dr. Panettiere, a copy of which was in evidence before the jury (R. 172). There was also testimony by Mr. Halley that on the afternoon of March 16, 1951, when petitioner appeared before the committee, he was informed that Dr. Panettiere had been a witness before the committee that morning, and had stated that petitioner could testify for a reasonable period (R. 41-42). At petitioner's request, the court instructed the jury that this evidence was to be considered as proof only of what the committee had told petitioner, and was not to be considered as proof of what Dr. Panettiere had said (R. 41).

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[2] It should be noted, however, that the jury had already been apprised that petitioner returned and testified at length on March 19, 20 and 21 (R. 46, 51-52).

Thereafter, petitioner introduced into evidence a portion of the transcript of his own appearance before the committee on March 16 (R. 127-128) which contained verbatim the statement of the chairman of the committee to petitioner concerning the doctor's testimony. Petitioner also introduced into evidence a letter from the chairman of the committee to him which stated that Dr. Panettiere had informed the committee that he could testify for a reasonable period, and, accordingly, that he was to appear before the committee at 2:00 p.m. that day (R. 124, 349, 350).

Subsequently, the Government introduced another portion of the transcript of the testimony of petitioner when he appeared before the committee on March 16. Included in this transcript was one brief statement by the committee to petitioner concerning Dr. Panettiere's testimony (R. 180). Mr. Halley had previously testified, in substance, to the contents of this statement, and it fell within the trial court's instruction limiting the probative effect of such evidence.

With this background, the trial court ruled out the transcript of Dr. Panettiere's testimony, offered only "as explaining the letter of the Chairman of the Committee" (R. 128), as follows (R. 183-184):

> * * * I am going to rule that it is not admissible. I have given consideration to it, and the only portion of it that I would deem admissible would be the certificate and we already have that marked. If the testimony of Dr. Panettiere is desired, he either may be

> presented as a witness by the defendant or someone must testify as to what he told the defendant and to what instructions he gave the defendant. Bearing upon whether or not the defendant's default was wilful, we are only concerned with what was conveyed to the defendant by testimony.

It is obvious that Dr. Panettiere's extra-judicial statement, concededly made out of petitioner's presence, was inadmissible. If the transcript was offered to prove the truth of the facts to which Dr. Panettiere testified, it was properly excluded as hearsay. If, on the other hand, as seems to have been the purpose, the transcript was offered to prove merely that Dr. Panettiere had made certain statements to the committee, without respect to their truth, it was irrelevant to the issue of petitioner's good faith unless petitioner had heard the testimony. But petitioner conceded that he was not present when Dr. Panettiere testified (R. 185), and he has at no time contended that he was informed of that testimony except by the committee to the extent set forth above.

4. Petitioner contends (Pet. 28-32) that the Senate Resolution 110 forwarded to the United States Attorney pursuant to 2 U.S.C. 194 *(supra,* pp. 3-4), made specific reference only to his refusal "to answer certain questions" and not to his refusal to answer any questions at all, and hence that he cannot be convicted of contempt on the latter ground. The argument is erroneous, both in its premise and its conclusion.

The Resolution certified to the United States Attorney a copy of the Committee's Report (S. Rep. No. 199, 82nd Cong., 1st sess; R. 354), and while it characterized the report as one dealing with "the refusal of Frank Costello to answer certain questions in response to subpena duly issued," it also directed the certification of "all the facts in connection therewith, * * * to the end that the said Frank Costello may be proceeded against in the manner and form provided by law" (R. 354). The report contained the complete transcript of Costello's appearances before the Committee on March 15 and 16, 1951, and although it, too, referred to his refusal to answer questions, it also recited that the Committee had, on March 17, discussed his "testimony and deportment" and had voted that he be cited for contempt (R. 358). It is obvious that the term "deportment" referred to Costello's conduct on March 15 and 16 which constituted the basis of the charges of default contained in counts 5, 6 and 8.

Thus, neither the Committee in its report nor the Senate in its resolution purported to decide, or to limit the grand jury in deciding, what charges, if any, should be brought against Costello as a result of his conduct before the Committee. The resolution simply referred the matter to the grand jury for such action as it might deem appropriate.

Moreover, the certification contemplated by Section 194 is not a substitute for an indictment, nor can it limit the scope of an indictment. Its only function is to call the attention of the appropriate

United States Attorney to the existence of a possible violation of which he might not normally be aware. After that, the matter is before the grand jury as is any other evidence of crime. Consequently, the terms of a certification by which the United States Attorney is informed as to the facts are of no concern to a contumacious witness.

The history of the legislation makes this clear. A section substantially the same as Section 192 was introduced in 1857 because a House committee had found itself unable adequately to deal with a contumacious witness. See Congressional Globe, 34th Cong., 3d sess., Part I, p. 404, *et seq.* In answer to fears of several members of the House that the bill conferred new and unprecedented powers upon the Congress, the proponents of the bill made clear that Congress was not in any way to prejudge the innocence or guilt of the contumacious witness but rather that all such powers were to be exercised in formal judicial proceedings (e.g., Cong. Globe, 34th Cong., 3d sess., Part I (1857), pp. 407, 427).

Thus, Congressman Orr, one of the key sponsors of the legislation stated:

> * * * after this bill has passed, this House will turn these matters over to the courts—tribunals which have the time, education, and facilities, for investigating such charges. This House cannot undertake to constitute itself a court to determine all these things, because it would consume too much of its time. [*Ibid.*, at p. 406.]

The substance of Section 194 was proposed from the floor of the House by Congressman Letcher, who stated:

> I desire to suggest the propriety of adding a third section to the bill, which will make it the duty of the Speaker of the House, or of the Clerk of the House, to report to the attorney for the District of Columbia any failure that may occur here under the law, in order that a prosecution may be instituted. [*Id.*, at p. 427.]

This proposal makes it clear that the purpose of what is now Section 194 was merely to create a formal method to make the facts available to the prosecuting agencies. Accordingly, a certification under Section 194 does not impose the limitations upon or conditions precedent to prosecution which petitioner urges.

It has even been held that no compliance with Section 194 is necessary to a prosecution under Section 192. See *United States* v. *Josephson*, 74 F. Supp. 958 (S.D. N.Y.), affirmed, 165 F. 2d 82 (C.A. 2), certiorari denied, 333 U.S. 838.

5. Finally, petitioner contends (Pet. 32-35) that the three counts of the indictment on which his conviction was sustained constitute only one contempt, so that it was error to impose separate punishment for three. Under the counts affirmed by the court below, petitioner received an aggregate sentence of 18 months' imprisonment and $2,000 in

fines[3] whereas the maximum punishment for a single offense under Section 192 is one year and $1,000 fine.

Petitioner relies upon cases which have held, in effect, that there is only one contempt when a witness refuses to answer several questions which call for substantially the same answer, even though there is in fact no right to refuse to answer any of them. See, e.g., *United States* v. *Yukio Abe*, 95 F. Supp. 991, 992 (D. Haw.); *Fawick Airflex Co.* v. *United Electrical R. & M. Wkrs.*, 92 N.E. 2d 431, 433 (Ohio App.). The rationale of such a position has no application here. Even if it is accepted that the impact of a refusal to answer a series of questions is not sufficiently different to justify separate penalties, this view would have no application in connection with contempts which have clearly separate impacts on the work of the tribunal.

Petitioner's refusal to answer any questions on March 15 (count 6) did not have the same effect on the committee's ability to perform its work as his later walkout that day (count 5). For so long as he was present, some technique might have been devised to enable him to testify without straining his voice (see R. 173, 177-178), the reason he asserted for refusing to testify. Moreover, the judge treated counts 5 and 6 as one offense (R. 318-319) and imposed only one punishment therefor. Peti-

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[3] He was sentenced to 6 months' imprisonment on counts 5 and 6, the sentences to run concurrently, and fined $1,000 on count 5, and $100 on count 6, but the latter fine was remitted. He was also sentenced to 12 months' imprisonment and to pay a fine of $1,000 on count 8. (R. 318-320.)

tioner's refusal to testify on March 16 (count 8) was clearly separate from his action on March 15, and not, as he claims, merely an adherence to a position previously taken. Even the medical testimony of two doctors which he adduced on the consecutive days was somewhat different. The committee made a fresh evaluation on the second day, March 16, of his claim of ill-health, and his refusal to abide by the committee's decision on that day was a new and separate act.

CONCLUSION

The questions presented were correctly resolved by the court below. Moreover, they are either lacking in substance or so peculiar to the facts of this case as to deprive them of general importance. None of them involves a conflict of decisions which should be resolved by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
CHARLES B. MURRAY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

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